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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

BORDER CITIES LAND CORPORATION, an Arizona corporation, Plaintiff/Appellee, v. CITY OF BISBEE, an Arizona municipal corporation; CITY OF BISBEE BOARD OF ADJUSTMENT, an administrative agency of the City of Bisbee; JOHN CHARLEY, Planning Director of the City of Bisbee; and ROBERT MESQUIT, Code Enforcement Officer of the City of Bisbee, Defendants/Appellants.	2 CA-CV 2007-0168 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200600091

Honorable Pendleton Gaines, Judge

AFFIRMED IN PART
VACATED IN PART AND REMANDED WITH DIRECTIONS

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P E L A N D E R, Chief Judge.

¶1 In this statutory special action, appellants City of Bisbee, its Board of Adjustment (BOA), and two city employees (collectively, the City) challenge the superior court's order granting summary judgment in favor of appellee Border Cities Land Corporation (BCLC) and vacating the BOA's zoning decision relating to BCLC's failure to provide free parking for its property, as the City alleges it is required to do. The City contends the court erred in vacating the BOA's decision by exceeding its authority in reviewing the decision and misinterpreting the City's zoning code. We agree with the City that the court improperly vacated portions of the BOA's decision, but we agree with the court's interpretation of the code. We therefore affirm the superior court's judgment in part, vacate it in part, and remand the case with directions to grant partial summary judgment in favor of the City.

Background

¶2 We view the evidence in the administrative record and reasonable inferences therefrom in the light most favorable to sustaining the BOA's decision. *See Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, ¶ 2, 54 P.3d 355, 358 (App. 2002). BCLC owns property referred to as the Copper Queen Plaza or Convention Center, located in the historic district of Bisbee. On the property is a building currently used for restaurants, a number of retail stores, office space, and meeting areas. The building is adjacent to a

parking area that BCLC has used as a lot for paid parking. In 2005, BCLC began to advertise the parking area as a separate lot for sale.

¶3 That action prompted the City, through its planning director and code enforcement officer, to notify BCLC that "[t]he current use" and "proposed transfer" of the lot violated the city zoning code by "fail[ing] to provide the designated number of available, free parking spaces for . . . employees, tenants, customers, business associates and guests." Pursuant to A.R.S. § 9-462.06, BCLC appealed the notice of violation to the BOA, arguing the notice was "without merit," the City was unequally enforcing the code, and the property was exempt.[1] After conducting a hearing, the BOA ruled in favor of the City, finding that BCLC was not exempt and was required to provide 176 spaces for free parking as long as its current usage of the property continued. BCLC then filed this statutory special action, *see* § 9-462.06(K), in which the superior court granted summary judgment in favor of BCLC and vacated the BOA's decision in its entirety. This appeal followed.

Discussion

¶4 In several related arguments, the City challenges the superior court's summary judgment ruling and argues the court erred in "reversing and vacating each and every determination made by the Board of Adjustment." The City maintains the court "exceeded

[1]At the hearing before the BOA and in its appeal to the superior court, BCLC argued on various grounds that it was exempt from the code's parking requirements and that its use was a legal non-conforming use. But the BOA rejected those assertions, the superior court did not address or rule on them, and BCLC does not argue those points on appeal. Therefore, we do not consider them. *See Torrez v. Knowlton*, 205 Ariz. 550, n.1, 73 P.3d 1285, 1287 n.1 (App. 2003) (issues not raised on appeal deemed abandoned); *see also* Ariz. R. Civ. App. P. 13(a)(6) and (b).

its authority" and incorrectly interpreted the zoning code in ruling that BCLC had complied with the code by providing for paid, rather than free, parking.

¶5 On appeal from a decision by a board of adjustment, both the superior court and this court review the administrative record "to determine whether the decision was arbitrary, capricious, or an abuse of discretion." *Blake v. City of Phoenix*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988); *see also* A.R.S. § 12-910(E); *Austin Shea (Ariz.) 7th St. & Van Buren, L.L.C. v. City of Phoenix*, 213 Ariz. 385, ¶ 29, 142 P.3d 693, 700 (App. 2006). And the law recognizes "a presumption of validity in favor of the Board's determination." *Mueller v. City of Phoenix*, 102 Ariz. 575, 581, 435 P.2d 472, 478 (1967). Therefore, a "court may not intervene if there is 'any' evidence to support the administrative decision, and should not weigh the evidence in making that determination." *Blake*, 157 Ariz. at 96, 754 P.2d at 1371. "We will not substitute our judgment for that of the agency if it was persuaded by the probative force of the evidence before it." *Id.* Rather, "we determine only if there is some credible evidence to support the board's ruling." *Burroughs v. Town of Paradise Valley*, 150 Ariz. 570, 573, 724 P.2d 1239, 1242 (App. 1986). When the issues involve statutory interpretation, however, our review of the board's legal determination is de novo. *Pingitore v. Town of Cave Creek*, 194 Ariz. 261, ¶ 18, 981 P.2d 129, 132 (App. 1998).

I. Paid or free parking

¶6 Article 8.1 of the Bisbee Zoning Code requires that "[o]ff-street automobile parking space shall be provided according to" a schedule set forth in the code, based on, inter alia, the property's use and number of employees. The article does not expressly state

whether such parking must be provided without a fee. Most of the discussion at the BOA hearing centered on whether BCLC's property was exempt from the code's parking requirements and how many parking spaces BCLC was required to provide. But the question whether the code required BCLC to provide free parking, rather than charging a fee, was also addressed. The BOA concluded:

> The current manner in which public parking is being provided at this location, on a pay per use basis, is not consistent with the requirements of the Zoning Code. In order for these spaces to fulfill their purpose of reducing the impacts on the rest of the community that arises [sic] from this commercial development, this parking must be provided without charge to the customers, employees and visitors to this location.

¶7 The superior court disagreed with that interpretation of article 8.1, stating: "There is nothing in any definition of the word 'provide' . . . which says that it means 'supply or give for free.'" The court ruled that BCLC was not in violation of the code's parking requirement when it "is in fact 'providing' the parking spaces in its pay lot." The court therefore granted summary judgment in favor of BCLC, rejecting the BOA's and the City's interpretation of the code and ultimately "revers[ing] and vacat[ing]" the BOA decision in toto.

¶8 The City asserts that "[t]he legislature has granted the Board of Adjustment the primary authority to hear and decide appeals when it is alleged that there has been an error in the interpretation of the zoning rules." Accordingly, the City argues, the superior court exceeded its authority in rejecting the BOA's decision. Under § 9-462.06(G)(1), a board of adjustment is empowered to "[h]ear and decide appeals in which it is alleged there is an error

in an order, requirement or decision made by the zoning administrator in the enforcement of a zoning ordinance." On review of such a decision, the superior court or this court on appeal "may affirm or reverse, in whole or in part, or modify the decision reviewed." § 9-462.06(K).

¶9 As noted above, we generally review to determine if the board's decision was arbitrary, capricious, or an abuse of discretion. *See Blake*, 157 Ariz. at 96, 754 P.2d at 1371; *see also* § 12-910(E). But our review of questions of statutory interpretation is de novo. *Pingitore*, 194 Ariz. 261, ¶ 18, 981 P.2d at 132. Thus, contrary to the City's arguments, we may independently consider the legal question of how the zoning code should be interpreted, and so too could the superior court. *See id.*

¶10 The City argues, however, that both the superior court and this court should defer to the BOA's decision and that the superior court failed to do so. This court has stated that "[j]udicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight." *U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989) (citation omitted). But that general rule does not necessarily apply when the agency's interpretation of a particular code provision is new. *See id.* at 212, 772 P.2d at 35. And, as noted above, the proper interpretation of a zoning ordinance is an issue of law on which "we are free to draw our own legal conclusions and are not limited to the review standard of arbitrary, capricious or abuse of discretion." *Id*. at 211, 772 P.2d at 34. In other words, an "agency's interpretation is not infallible, and courts must remain the final authority on critical questions of statutory construction." *Id.*

¶11 In this case, article 8.1, the code provision at issue, is not new: it has been in effect since at least 1972. The superior court implicitly and correctly acknowledged that fact when it addressed the City's motion for reconsideration and clarification. The City's interpretation of the code's parking provision, however, is new. Even if the City had had no occasion to interpret that provision before 2005, it was aware that the lot had been used for paid parking since at least 1996 and had done nothing to advance or enforce its current interpretation of the code. In fact, the City itself apparently leased a portion of the lot. Under these circumstances, we do not owe great deference to the BOA's interpretation of the code on this point.

¶12 The BOA determined "the current manner in which the public parking is being provided, . . . on a pay per use basis, is not consistent with the requirements of the Zoning Code." Article 8.1, however, states only that a business or residence must "provide[]" off-street parking space; it does not expressly state whether that parking must be provided for free or may be provided for a fee. We must, therefore, determine what the term "provide[]" means in the code. "Municipal ordinances are construed in the same manner as state statutes." *Douglass v. Gendron*, 199 Ariz. 593, ¶ 10, 20 P.3d 1174, 1177 (App. 2001). Our objective in interpreting such ordinances "is to accomplish the legislative intent by considering the ordinance as a whole and giving harmonious effect to all of its sections." *Id.*

¶13 Because the term "provide" is not defined in the code, we "give the word its plain and ordinary meaning." *See State v. Alawy*, 198 Ariz. 363, ¶ 8, 9 P.3d 1102, 1104 (App. 2000). To "provide" is defined as "[t]o furnish; supply" or "[t]o make available." *The*

American Heritage Dictionary 997 (2d college ed. 1991). And, as BCLC argues, "there are innumerable instances in which people 'provide' goods, services, or even rental space in exchange for a fee."

¶14 The term is also used in various other sections of the Bisbee code. For example, article 2.4.2(B) requires notice of a hearing to be "provided" to the public; article 10.5 states that "[a]ffidavits will be provided to show conformance with" certain federal regulations; and article 8.1.6 requires churches to provide "[o]ne parking space for every four (4) persons for whom seating is provided in the main auditorium." Those uses of the term "provide" generally do not connote an associated fee. But the code also uses the term "provide" in association with matters that typically are furnished for a fee, such as lodging and meals at a boardinghouse and refueling and servicing of vehicles at a service station. *See* Bisbee Zoning Code Article 9.2(23), (48).

¶15 "'[W]here the language of a statute [or ordinance] is susceptible of more than one interpretation the court must adopt the interpretation which is reasonable.'" *Sandblom v. Corbin*, 125 Ariz. 178, 183, 608 P.2d 317, 322 (App. 1980), *quoting Hart v. Arganese*, 82 Ariz. 380, 384, 313 P.2d 756, 758 (1957). As noted above, the common meaning of "provide" neither denotes nor connotes the absence of a fee; it means merely that something is made available. Likewise, the code's use of the term to refer both to items and services that carry a fee and others that do not suggests the word "provide" can reasonably encompass matters, including parking spaces, for which a fee is charged.

¶16 Interpreting the phrase "shall be provided" to include providing either free or for a fee comports with the general rule that "[z]oning ordinances, being in derogation of common law property rights, will be strictly construed and any ambiguity or uncertainty decided in favor of property owners." *Kubby v. Hammond*, 68 Ariz. 17, 22, 198 P.2d 134, 138 (1948). The City maintains this rule is applicable in some cases but not in "other classes of cases" such as this. *See, e.g.*, *Rotter v. Coconino County*, 169 Ariz. 269, 276, 818 P.2d 704, 711 (1991) (rejecting strict-construction rule in case "deal[ing] with a nonconforming use's *limited* statutory right to *expand*"); *City of Scottsdale v. Scottsdale Assoc'd Merchants, Inc.*, 120 Ariz. 4, 5, 583 P.2d 891, 892 (1978) (in eliminating nonconforming uses, "[c]ities and other political subdivisions must strictly comply with the state statute which delegates to them the power to act"); *Specht v. City of Page*, 128 Ariz. 593, 597, 627 P.2d 1091, 1095 (App. 1981) ("[T]he axiomatic rule that zoning ordinances, being in derogation of common law property rights, are to be strictly construed in favor of property owners applies in cases concerning compliance with the statutory notice requirements necessary for enactment of the zoning ordinance.") (citation omitted).

¶17 Because this case does not involve any issues of preexisting, nonconforming use or illegal adoption of a local ordinance in violation of procedural requirements or in excess of state statutory authority, the City argues, the strict-construction rule does not apply here. We disagree. Although the City is correct that the rule has been given more weight in some contexts than in others, this case is closely analogous to *Kubby*, in which the rule

appears to have been first announced in this state. 68 Ariz. at 22, 198 P.2d at 138 (citing out-of-state cases for the rule).

¶18 The court in *Kubby* did discuss whether the defendant had a right to continue his pre-existing operation after a change in the zoning of his property, but the court first held as a matter of law that his business fit within a certain zone under the Phoenix code. *Id.* at 23, 198 P.2d at 138. The court's statement of the strict-construction rule was made in its discussion on that point. *Id.* at 22, 198 P.2d at 138. We therefore find the rule applicable here—when a term in the Bisbee zoning ordinance is ambiguous and, therefore, raises a question whether the use of the subject property complies with the ordinance. *See id.*; *cf. Murphy v. Town of Chino Valley*, 163 Ariz. 571, 577, 789 P.2d 1072, 1078 (App. 1989) (not applying strict-construction rule when no ambiguity found); *Phoenix City Council v. Canyon Ford, Inc.*, 12 Ariz. App. 595, 598, 473 P.2d 797, 800 (1970) (not applying rule when plain meaning of term in question was same as code's definition of term).

¶19 Based on all of the foregoing factors and considerations, we agree with the superior court and BCLC that, as used in the code, the phrase "shall be provided" does not mean "shall be given free of charge." Thus, we conclude that article 8.1's requirements are met if an entity provides on its property the requisite number of parking spaces, even if it charges a fee to use them.

¶20 Contrary to the City's argument, this interpretation does not necessarily lead to a conflict between article 8.1 and the code's ban of commercial parking lots in residential and manufacturing zones. *See* Bisbee Zoning Code Uses and Zone Matrix. Although

interpreting the term "provide" to include pay-for-use lots could, in isolation, mean that such a lot would meet the requirements within article 8.1.2 for residential properties, the code prohibits such lots in residential areas. *See* Bisbee Zoning Code Uses and Zone Matrix. Thus, we do not agree with the City's argument that "[t]his interpretation is fundamentally inconsistent with the City's designation of the permitted uses that are allowed in various zoning districts and the restrictions imposed by the Zoning Code on the location of commercial parking facilities." Rather, the two parts of the code can be read together to allow paid commercial parking to fulfill the requirements of article 8.1 where it is permitted and to bar it when expressly prohibited by the code.

¶21 Likewise, we are not persuaded by the City's argument that allowing paid parking to satisfy article 8.1's requirements undermines the purposes of the parking rules. When, as here, a "term is undefined and subject to more than one reasonable meaning," we will "'examine the policy behind the statute [or code], the evil sought to be remedied, the context, the language, and the historical background of the statute [or code].'" *Moreno v. Jones*, 213 Ariz. 94, ¶ 24, 139 P.3d 612, 616 (2006), *quoting Clifton v. Decillis*, 187 Ariz. 112, 114, 927 P.2d 772, 774 (1996). Referring to its counsel's argument before the BOA, the City contends the purpose of these parking rules was "to address the shortage of parking in [Bisbee's] historic district" and "to decrease the impacts of this commercial development upon the rest of the community and to require those who benefit from the development to bear the burden of its impacts." And, the City asserts, "[b]y imposing a fee upon the use of this parking area, the customers and clients [will be] impelled to first look elsewhere for

available parking and to use any other vacant public spaces, rather than to pay an additional fee," a phenomenon "directly contrary to the purposes for which the parking rules were adopted."

¶22 Even assuming article 8.1 was enacted for the purpose the City argues,[2] the actual evidence presented before the BOA does not support the City's contentions or ¶ 3 of the BOA's decision. Whether provided for free or for a charge, additional off-street parking is being furnished to help ease the shortage of parking in this area. And the City's arguments that people will choose free street parking over paid, and arguably more accessible and convenient, on-site parking are not supported by any evidence in the record and are purely speculative. Although it might be true that some people will choose free parking, others may choose to pay in order to park closer to their destination.

¶23 Likewise, as BCLC points out, it could provide parking validation for its employees and customers, thereby only charging members of the public who park in its lots without visiting its businesses. In that event, although the parking required by article 8.1 would be provided for a fee, the purpose of the code as urged by the City would still be fulfilled. In sum, the code's alleged purposes do not compel a conclusion that the required

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[2]Even in the BOA hearing context, we cannot say that counsel's argument, absent anything to support it, constitutes evidence on this point. And the record does not contain the "General Plan" to which the City refers on appeal. The only statement of purpose in the code itself is this: "The purpose of this ordinance is for the protection of the public health, safety, comfort, convenience and general welfare and in order to secure the social, physical and economic advantages of the citizens of the City of Bisbee, Arizona." Bisbee Zoning Code Article 1.1. We cannot say that general statement of purpose directly supports the City's position or meaningfully aids our analysis here.

parking must be provided free of charge. Thus, we agree with the superior court that the BOA erred in interpreting the term "provide" and, therefore, that the BOA's ruling on that point in ¶ 3 of its decision should be vacated.

II. Other findings and conclusions

¶24 Our conclusion that the BOA misinterpreted the code to require businesses to provide free parking does not end our review. As the City points out, "[t]here were not less than five distinct interpretive decisions included in the Findings of Fact and Conclusions of Law rendered by the Board of Adjustment." In addition to the conclusion in ¶ 3 of its decision that "a pay per use" parking lot was "not consistent with the requirements" of the code, the BOA also ruled:

> 1. The Zoning Code of the City of Bisbee requires that off-street automobile parking and loading spaces be provided in connection with the operation of retail stores, service businesses, restaurants, and assembly areas. Section 8.1 of the Zoning Code.
>
> 2. Based upon the type and nature of the businesses that are presently being maintained on the [BCLC] property . . . and the number of employees that are present at that site, a total of 176 freely available parking spaces are required under the Bisbee Zoning Code for this use.
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> . . . .
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> 4. The subject property is not exempt from the application of these parking requirements. The existing lot or lots . . . include available parking areas that have been continuously used for these purposes since the original development of this property in 1939. This property is physically and legally able to meet these requirements.

> 5. [E]xisting off-street automobile parking spaces that are being maintained in connection with the existing main building and usage of that building shall be maintained so long as the main building or use remains in place. The existing, designated parking areas on this site are not subject to other uses or development under the Zoning Code as long as the current usage of the Copper Queen Plaza or Convention Center is being maintained by the owners of this property.

In addressing the City's motion for reconsideration below, the superior court stated these "other issues" "were not reached or decided." In its final judgment, however, the court "reversed and vacated" the BOA's decision in its entirety.

¶25 We review de novo the BOA's decision interpreting the code's requirement that businesses, including those operated on BCLC's property, must provide off-street parking. *See Pingitore*, 194 Ariz. 261, ¶ 18, 981 P.2d at 132. On this point of interpretation, however, we agree with the City that the code's clear language does require BCLC to provide off-street parking. *See* Article 8.1. At oral argument in this court, BCLC conceded that point and did not challenge ¶ 1 of the BOA's decision. The BOA's other findings and conclusions itemized above may only be reversed if there was no credible evidence to support them. *See Austin Shea*, 213 Ariz. 385, ¶ 29, 142 P.3d at 700.

¶26 We cannot say the BOA lacked any credible evidence to support the finding in ¶ 2 of its decision on the number of parking spaces the code requires, assuming the property will physically accommodate that number of spaces. The City presented evidence on the square footage of BCLC's building based on county assessor's reports and on the number of employees determined by a visual inspection by the City's Code Enforcement Officer. BCLC presented no contradictory evidence suggesting the City's figures were

inaccurate.[3] In short, the record supports the BOA's finding, based on the circumstances that existed at the time of the hearing, that the code required 176 parking spaces.[4]

¶27 The same cannot be said with respect to ¶ 4 of the BOA's decision. There, the BOA found the property "is physically and legally able to meet the[] [code's parking] requirements." At the hearing before the BOA, BCLC argued that the City had presented no evidence on how many parking spaces actually could fit on the subject lot. The record of the proceedings before the BOA lacks any evidence to support the BOA's finding that the parking area in fact can hold the 176 parking spaces its decision requires. Indeed, the City attorney stated that, "with the prior operators and with accounts they[] [had] come in at 160" spaces, and the City conceded that "if [150 spaces] is all that is physically available, then that is what the City would accept." Similarly, the City attorney acknowledged that, under the

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[3]BCLC implies on appeal that the BOA hearing was inadequate because "[t]he Board swore in no witnesses and heard no sworn testimony." The BOA, however, was not required to swear in witnesses. "Although a board of adjustment has authority to administer oaths and take evidence, it does so at its own discretion." *Burns v. Davis*, 196 Ariz. 155, ¶ 25, 993 P.2d 1119, 1126 (App. 1999); *see also* A.R.S. § 9-462(B). Additionally, BCLC did not object to the lack of sworn testimony at the hearing and, therefore, the argument is waived. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004) ("[A]rguments raised for first time on appeal are untimely and, therefore, deemed waived."). BCLC also contends "[t]he Board improperly imposed the burden of proof on" it. But BCLC did not object on that basis before the BOA, did not raise the argument before the superior court, *see Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994), and did not adequately develop the argument on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6) and (b). Accordingly, we decline to address this argument as well. And, in any event, BCLC has not shown that the BOA's decision turned on any alleged misallocation of the burden of proof.

[4]In ¶ 2 of its decision, the BOA stated that the code requires "a total of 176 freely available parking spaces." To the extent the phrase "freely available" implies that BCLC is required to provide parking for free, rather than at a charge, we disagree for the reasons noted above and strike the word "freely" from that particular finding.

code, property owners are required to "do the best they can" in meeting the parking requirements "if they can't meet th[e] standard" set by the code.

¶28 Because the record contains no evidentiary support for the BOA's finding that the parking area is "physically and legally able" to accommodate 176 parking spaces, we must vacate that finding. As the BOA properly concluded in ¶ 4, however, the subject property is not entirely exempt from the zoning code's parking requirements, and BCLC must provide the 176 spaces to the extent the property permits. As the City conceded before the BOA, BCLC is only required to provide as many parking spaces as the subject area physically allows.[5]

¶29 With respect to ¶ 5 of the BOA's decision, which includes a so-called non-degradation clause, BCLC argues "the City may not use the board of adjustment proceeding as a means of forever fixing" the number of required parking spaces. But that is not what the BOA did in its decision. Indeed, as BCLC points out, under the code, "[i]f BCLC elects to change the use of its building to reduce parking requirements and create excess space on the parking lot, it is free to do so." Given the uncontested facts presented to the BOA, we cannot say its decision as to the number of required parking spaces based on BCLC's *current* use of its property was arbitrary, capricious, or an abuse of its discretion. *See Blake*, 157 Ariz. at 96, 754 P.2d at 1371.

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[5]In ¶ 4 of its decision, the BOA also stated the parking area in question had "been continuously used for [parking] purposes since the original development of th[e] property in 1939." The argument by the City's counsel was the only information presented to the BOA in support of that finding. Because the finding was not supported by any credible evidence, we also must vacate it.

Disposition

¶30 We affirm that portion of the superior court's judgment in favor of BCLC allowing it to charge a fee for the parking on its property that the code requires it to provide. Therefore, we vacate ¶¶ 3 and 6 of the BOA's decision relating to that issue. We also vacate those portions of ¶¶ 2 and 4 of the BOA's decision discussed above for the reasons stated. The balance of the court's judgment in favor of BCLC is vacated, and the case is remanded to the superior court for entry of summary judgment in favor of the City on the remaining findings and conclusions set forth in the BOA's decision. *See Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 24, 965 P.2d 47, 54 (App. 1998) (ordering "trial court to enter partial summary judgment in favor of plaintiffs").

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge